Petition

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

MICHAEL YOUNG WARDER, *et al.*,
as Proposed First Trustees of the
Unification Theological Seminary,
Petitioners,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY
OF THE STATE OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF NEW YORK COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether petitioners' rights to freedom of speech, religion and due process were violated by the Board of Regents when it allowed two Regents who had publicly prejudged the matter on political and religious grounds to participate in the decision to deny petitioners' application for an educational charter.

2. Whether petitioners were entitled to a trial on the merits of their constitutional claim that the denial of their application was a result of the exercise of their First Amendment freedoms.

3. Whether petitioners' right to Equal Protection of the law was violated by respondent when it subjected petitioners to novel and stringent requirements of a kind never imposed on similarly situated applicants, actuated in part by a joint resolution of the New York State Legislature exerting pressure on the Board to follow other than normal procedures, all of which impaired petitioners' opportunity to obtain a favorable determination.

TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 10

CONCLUSION 19

Appendix A 1a

Appendix B 19a

Appendix C 28a

Appendix D 35a

Appendix E 42a

TABLE OF AUTHORITIES

Cases: **Page**

Arnett v. Kennedy,
416 U.S. 134, 197 (1974) 11

Berger v. United States,
255 U.S. 22 (1921) 12

Berkshire Employees Ass'n. v. N.L.R.B.,
121 F.2d 235, 239 (3rd. Cir. 1941) 13

Cinderela Career and Finishing Schools, Inc. v. F.T.C.,
138 U.S. App. D.C. 152, 425 F.2d 583 (1970) 13

Committee for Public Education v. Nyquist,
413 U.S. 756 (1973) 16

F.T.C. v. Cement Institute,
333 U.S. 683 (1948) 12

Goldberg v. Kelly,
397 U.S. 254, 271 (1970) 11

Healy v. James,
408 U.S. 169 (1972) 14

Hortonville Joint School District v. Hortonville Education Association, 423 U.S. 1301 (1975) 12

Lemon v. Kurtzman,
403 U.S. 602 (1971) 16

Mayberry v. Pennsylvania,
400 U.S. 455, 469 (1971) 11

Morrissey v. Brewer,
408 U.S. 471 (1972) 10, 11

Perry v. Sinderman,
408 U.S. 593 (1972) 14, 15

Sherbert v. Verner,
374 U.S. 398 (1963) 14

Staton v. Mayes,
552 F.2d 908 (10th Cir.), *cert. denied,*
434 U.S. 907 (1977) 12

Walz v. Tax Commission,
397 U.S. 664, 696 (1970) 16

Withrow v. Larkin,
421 U.S. 35, 47 (1975) 11, 12

Yick Wo v. Hopkins,
118 U.S. 356 (1886) 17

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MICHAEL YOUNG WARDER, *et al.*, as Proposed First Trustees of The Unification Theological Seminary,
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v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF NEW YORK COURT OF APPEALS

The petitioners, Michael Warder Young, Neil Albert Salonen, Edwin Ang, David S.C. Kim, Bo-Hi Pak, Sun Myung Moon, Joseph A. Tully, William Bergman and Mose Durst, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the State of New York Court of Appeals entered in these proceedings on June 11, 1981.

OPINION BELOW

The opinion of the State of New York Court of Appeals, reported at 53 N.Y.2d 186, 440 N.Y.S. 2d 875, 423

N.E.2d 352 (1981), appears in Appendix A, *infra,* 1a-20a. The opinion of the Supreme Court of the State of New York Appellate Division – Third Judicial Department, reported at 75 App. Div.2d 666, 426 N.Y.S. 2d 849 (3rd Dept. 1980), appears in Appendix B, *infra,* 21a-27a. The opinions of the Supreme Court of New York, Albany County at Special Term, not reported, appear at Appendices C and D, *infra,* 28a-41a.

JURISDICTION

The judgment of the State of New York Court of Appeals was entered on June 11, 1981. On August 25, 1981, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to October 8, 1981, and on October 2, 1981, further extended the time to October 22, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

Petitioners are the Proposed First Trustees of the Unification Theological Seminary (the "Seminary"), an educational institution in Barrytown, New York. The Seminary is sponsored and financially supported by the Holy Spirit Association for the Unification of World Christianity (the "Church"), a religious organization incorporated under the law of the State of California. The Seminary offers a two-year graduate program in religious education, and, upon receipt of a provisional charter, proposes to grant the degree of Master of Religious Education. Petitioners seek review of the 4-3 decision of the State of New York Court of Appeals upholding the denial of a provisional charter and validating as constitutionally firm the process by which that denial was achieved.

In April 1975, petitioners as Proposed First Trustees of the Seminary applied for a provisional charter. Although such applications are normally processed expeditiously, Respondent conducted an extraordinarily lengthy and unprecedentedly attenuated investigation, admittedly because of the Seminary's association with the Church. For 30 months every recommendation by staff personnel and independent consultants favored granting the application, but on February 22, 1978, the Board of Regents denied the application based almost entirely on information developed in the last two months of the 34 month investigation (App. A, *infra,* 16a-17a; App. E, *infra,* 44a-47a).

Under the law of the State of New York, no institution of higher learning may incorporate or grant degrees, except by obtaining a charter from the Board of Regents of the University of the State of New York. The Education Law permits the Regents to grant charters to institutions "whose approved purposes are in whole or in part, of educational or cultural value deemed worthy of recognition and encouragement by the university". N.Y. Education Law § 216. The only specific requirements for incorporation as a degree-granting institution are that the applicant must have resources of at least $500,000 and must make suitable provision for education equipment and proper maintenance. N.Y. Education Law § 218. A provisional charter may be granted "on evidence satisfactory to the regents that the conditions for an absolute charter will be met within a prescribed time." N.Y. Education Law § 217.

Following petitioners' application for a provisional charter in April 1975, the State Education Department began an investigation. In June 1976, the Deputy Commissioner of Higher and Professional Education issued a

report favorably recommending the application, but also recommending that action be delayed pending anticipated investigations of the Church, the Seminary's sponsor.

In the Fall of 1976, two independent consultants, experts in theological education, were retained by the State Education Department. These consultants also recommended favorable action. By February 1977, the Office of Counsel for the State Education Department, the Deputy Commissioner of Higher and Professional Education and the Commission of Education had recommended approval and had forwarded the application to the Board of Regents for action at the February 1977 meeting (App. A, *infra,* 2a).

At the Board's February 22, 1977 meeting, the State Department of Education formally requested approval of the application. Regent Yavner, having received a letter from the Union of [American] Hebrew Congregations, expressed concern as to the legitimacy of the Church's activities. Action on the application was delayed, ostensibly to obtain further information.

On March 22 and 24, 1977, the New York State Legislature passed a joint resolution and transmitted it to the Board of Regents, urging the Board to stay the Seminary's application of pending legislative investigations into the Church's activities. The recitals on which the legislature exhorted the Board to delay include the following statements:

> —The activities of the Unification Church and its founder, Reverend Sun Myung Moon have made headlines recently for alleged sophisticated brainwashing techniques on young people luring them from family and community ties;

> —Reverend Moon's sect was refused bids to join the National Council of Churches, the National Association of Evangelicals in Korea and the New York City Council of Churches;
>
> — The sect has been investigated by the State Attorney General's office and criticized by Protestant, Roman Catholic and Jewish leaders for anti-democratic and antisemitic teachings;

On April 27, 1977, an open meeting of the Board of Regents was held to consider the application. A motion to delay eight months for further investigation, as the Joint Resolution had urged, was granted.

The Regent's decision to delay was taken amidst a spate of invidious allegations about the sponsoring Church's beliefs, association and activities. In addition to the Joint Resolution, two Regents in particular were outspoken advocates against the Church.

Regent Griffith was concerned that "the political and religious tenets advocated" by the Church were "incompatible" with "the principles of political and religious freedom which are central to our pluralistic democracy." He expressed his concern that approval of the charter would be "widely interpreted . . . as official approval of the Unification Church," and critically, he categorically resolved to deny the charter because of his disapproval of the purposes and activities of the Church:

> I disapprove of the Church's purposes and activities. So I must, in logic and conscience, reiterate my disapproval of a charter for the Church's seminary.

(App. A, *infra*, 15a.)

Regent Yavner speaking in support of delaying consideration, charged that the Church was connected with the Korean Central Intelligence Agency, and had engaged in "brainwashing." He further stated that "if proof is needed, we need time to get that proof." He stated that he had read the *Divine Principle,* (which contains the religious beliefs of the Church) and found it "dangerous" and analogized it to Hitler's *Mein Kampf* (App. A, *infra,* 15a).

In contrast, Regent Clark remarked:

> I am not satisfied that the questions raised and the reasons offered in support of the motion to delay action upon this application justify any delay. *This body has granted temporary certification to other applicants in the past without raising these types of questions.* In regard to this application, it is my personal belief that serious questions of discrimination, civil liberties and first amendment issues are at stake. In the light of these questions, I must vote a strong NO against the motion to delay.

(App. A, *infra,* 15a) (Emphasis added.) The Regents resolved to delay action until December 1977, and created a committee for further study.

In July 1977, dissatisfied with the progress of the application, petitioners sought to compel an immediate decision in the first of two proceedings, consolidated below. In a decision dated November 28, 1977, the New York Supreme Court for Albany County at Special Term ruled that the delay was not unreasonable. No order was entered at that time (App. C, *infra* 28a).

In mid-November 1977, the study committee still could find no reason to deny the application. Yet another independent consultant found the facilities and administration adequate and found no evidence of "brainwashing," KCIA involvement, or deceptive fund-raising practices.

It was at this point, six days prior to the December 1977 meeting, that the Regents, stymied in the search to find a reason to deny the application after having received yet another favorable recommendation, charted a different course, including several procedurally unfair maneuvers. Counsel for the Board revealed the existence of six unsubstantiated letters and affidavits adverse to the Church (some dated months earlier) and gave petitioners five days to respond. With almost no forewarning,[1] an on-site review team conducted an inspection of the Seminary's records on December 20, 1977, a time when the school registrar and other staff familiar with the record-keeping system were away for the holidays. Still no decision was made at the Board's December meeting (App. A,*infra,* 16a).

On February 22, 1978, the Board of Regents, without a statement of reasons but based upon the recommendation

[1]Dr. Tubbs of the Department of Education placed a telephone call at 4:30 p.m. on December 19, 1977, to inform the Seminary that the review team would conduct an inspection at 9:00 a.m. the next morning.

of the committee, Appendix E, *infra,* denied the provisional charter. The committee report and recommendation relied upon concerns not previously expressed and almost entirely on information of inadequate record keeping obtained from the December 20, 1977 on-site review, and on petitioners' failure to provide an audited financial statement of the Church.

The petitioners filed a second proceeding in the New York Supreme Court for Albany County at Special Term, this one seeking to annul the decision denying the provisional charter. The petition claimed that 1) the Board of Regents' decision was discriminatory; 2) bias and prejudice of some of the Regents infected the entire administrative proceeding; 3) other applicants with greater deficiencies had been granted provisional charters and had not been subjected to such a lengthy and attenuated investigation; and 4) that the denial was as a result of petitioners' exercise of First Amendment rights.

Respondent filed a motion for summary judgment, supported solely by an affidavit of counsel. Relying only on the record of the proceeding, respondents claimed entitlement to summary judgment because there was a rational basis for the decision of the Board. No affidavits from members of the Board concerning their motivation, bias or prejudice were submitted. In opposition to respondent's motion for summary judgment, petitioners submitted several affidavits including that of former Commissioner of Education Ewald B. Nyquist who was personally involved in processing applications for provisional charters, including that of petitioners.

Judge Jones, joined in his dissent by Judges Meyers and Fuchsberg, catalogued the procedural irregularities and disparities in treatment to support of petitioners' claim.

The dissenters concluded that under these circumstances petitioners were entitled to a trial on the merits of the claimed constitutional violations.

Judge Jones' summary of the Nyquist affidavit appears in full at App. A, *infra,* 13a-15a. He cited, for example, Nyquist's statement that the Board delayed in order to search for a reason to deny the application: "[The Board] delayed making a decision on the application for an unconscionable length of time in the hope of uncovering negative findings on which to base a denial". He also noted that "after almost two years of investigation and evaluation, *no reason existed for denial of the Seminary's application* nor did a reason exist for further delaying a decision."

Judge Jones found support for petitioner's claim of discriminatory treatment in Nyquist's affidavit:

> [T]he Board of Regents ha[s] chartered institutions with greater deficiencies and/or fewer strengths than the Seminary possesses . . . and . . . the Seminary has been subjected to greater scrutiny and has been held to higher requirements than other applicants for a Provisional Charter.

(App. A, *infra,* 13a-15a.).

On November 14, 1978, the Supreme Court of the State of New York for Albany County at Special Term entered orders granting respondents' motion for summary judgment, (App. D, *infra,* 35a-36a), and dismissing both the proceeding seeking to annul the determination which denied the application and the earlier proceeding claiming unreasonable delay (App. C. *infra,* 28a-29a). The judgments were appealed to the Supreme Court of the State of New York Appellate Division, Third Judicial

Department, which on May 12, 1980 affirmed (App. B, *infra,* 20a). On December 1, 1980, the State of New York Court of Appeals granted permission to appeal and on June 11, 1981, a sharply divided court affirmed the lower court's decision, holding that 1) the expressed hostility of two Regents to the religious beliefs of petitioners, including the statement of one of them that he disapproved of the Church and that the application should be denied, did not render the particular Regents or the Board as a whole incapable of an unbiased evaluation; 2) there was no need for a full exploration of petitioners' claim that the denial was as a result of the exercise of First Amendment freedoms; and 3) the disparity of treatment received by petitioners was justified by the expressed substantial concerns of legislators and clergy.

REASONS FOR GRANTING THE PETITION

1. The Decision Below Conflicts In Principle With Decisions Of This Court Holding That State Administrators Who Publicly Commit Themselves To Deny An Application On Political And Religious Grounds May Not Participate In A Decision To Deny That Application.

The Due Process Clause of the Fourteenth Amendment requires that state administrators render a fair and impartial decision untainted by bias or prejudice. Petitioners are constitutionally entitled to a resolution of their claim by impartial decision-makers. *Morrissey v. Brewer,* 408 U.S. 471 (1972).

The denial of a provisional charter has a devastating impact on the ability of the Seminary to function effectively, and on the ability of Church to educate its members and others in its religious principles, and to train its leaders for the future.

Particularly in a case such as this, where the substantive standards are unarticulated and the decision rests so largely in the administrator's unbridled discretion, the purity of the decisional process is vital to the legitimacy of the Board's action. Special urgency for this Court's guidance exists here, for besides giving evidence of prejudgment and prejudice, the record shows that these attitudes were rooted in the uniquely treacherous soil of religious and political animosity.

Because of the difficulties involved in proving actual prejudice and bias, because the appearance of even-handedness is at the core of due process and because of the enormous weight which this Court has placed upon the principle of neutrality, particularly when the lack of neutrality is based upon invidious classifications, the authority of this Court is required to define the precise contours of neutrality and the required showing to invalidate an administrative determination in which openly partisan decision-makers participated, in order that the moral authority of the law and the accuracy of its application do not falter in state administrative proceedings.

This Court has repeatedly held that "the right to an impartial decision-maker is required by due process" in every case, *Arnett v. Kennedy,* 416 U.S. 134, 197 (1974) (White, J., concurring in part and dissenting in part), and that "the appearance of even-handed justice . . . is at core of due process." *Mayberry v. Pennsylvania,* 400 U.S. 455, 469 (1971) (Harlan, J. concurring). Accordingly, this Court has even mandated the disqualification of decision-makers who in fact "have no actual bias" if they reasonably appear to be biased. *See, e.g., Morrissey v. Brewer, supra, Goldberg v. Kelly,* 397 U.S. 254, 271 (1970).

In *Withrow v. Larkin,* 421 U.S. 35, 47 (1975), this Court explained:

> Not only is a biased decision-maker constitutionally unacceptable, but our system of law has always endeavored to prevent even the probability of unfairness. *In Re Murchison* [349 U.S.] at 136, 99 L.Ed. 942, 75 S.Ct. 623 . . . In pursuit of this end, various situations have been identified in which experience teaches that the *probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable.*

(Emphasis added.)

One situation so identified exists where an adjudicator has publicly committed himself to a factual determination in advance of considering the matter. While the Court held in *Withrow v. Larkin, supra,* that advance knowledge of adjudicative facts was not enough, advance commitment on factual determinations crosses the lines of neutrality. See *Staton v. Mayes,* 552 F.2d 908 (10th Cir.). *cert. denied,* 434 U.S. 907 (1977). This is particularly so where, as here, the factual familiarity is not gained by the agency in the performance of its statutory role but from sources outside of the administrative process, and where the position publicly taken involves not merely broad issues of policy, but the application of policy and law to a particular determination. *See Hortonville Joint School District v. Hortonville Education Association,* 423 U.S. 1301 (1975); *F.T.C. v. Cement Institute,* 333 U.S. 683 (1948).

Similarly, where the adjudicator has targeted an applicant for abuse or criticism based upon public pressure or his status as a member of a minority group, principles of neutrality are offended. *Berger v. United States,* 255 U.S. 22 (1921).

Where some decision-makers are disqualified because of their lack of neutrality or because of the risk of it, the entire process is infected. A decision in which these administrators participated cannot stand and courts will not engage in deciding whether their role was decisive. *Cinderella Career and Finishing Schools, Inc. v. F.T.C.*, 138 U.S. App. D.C. 152, 425 F.2d 583 (1970); *Berkshire Employees Ass'n v. N.L.R.B.* 121 F.2d 235, 239 (3rd Cir. 1941).

The risk of lack of neutrality evidenced by the comments and commitments of the Regents was heightened when the state legislature passed a joint resolution "memorializing" the Regents to delay petitioners' application because the sponsoring Church's teachings were widely criticized by established religions.

The decision below permitting participation in the final decision of two Regents who publicly committed themselves in advance of decision or otherwise expressed hostility to petitioners' religious and political beliefs conflicts with the decisions of this Court and other federal courts establishing principles of neutrality in decision-making and protecting First Amendment freedoms. The general importance of these issues to maintaining the integrity of state administrative decision-making with regard to church-related institutions calls for the granting of the petition for certiorari to review the judgment below.

2. The Decision Of The State Of New York Court of Appeals Is In Conflict With This Court's Decision In Perry v. Sinderman.

Petitioners filed suit in the Supreme Court for Albany County at Special Term alleging, among other things, that the denial of their application for a provisional charter was as a result of the exercise of their First Amendment rights.

Decisions of this Court have recognized that denial of official state recognition of colleges or college organizations based upon that entity's engaging in protected activities abridges associational freedoms. *Healy v. James*, 408 U.S. 169 (1972). The Free Exercise Clause, designed to protect matters of conscience from any degree of compulsion, protects against subtle discrimination by indirect burdens imposed on account of one's religion or association with a religious organization. *Sherbert v. Verner*, 374 U.S 398 (1963).

Petitioners claim that the denial of a provisional charter (and degree-granting status) has severe practical impact upon the Seminary. It was undisputed below that the denial of a provisional charter inhibits its ability to attract a variety of students, restricts its participation in various educational associations, precludes its foreign students from qualifying for visas, and disables all students from eligibility for many student loans. This impact impermissibly burdens petitioners' associational freedoms.

Petitioners contend that the denial of the provisional charter was motivated by a desire to suppress their religious freedoms and by a non-secular purpose to promote established religions, or, at least, that the denial has those effects. Against these claims, Respondent contends that there was a substantial basis in the record to support the decision and that the Board disclaims any constitutionally impermissible result or motive of reprisal for religious beliefs and practices.

In *Perry v. Sinderman*, 408 U.S. 593 (1972), this Court held that summary judgment is inappropriate in the face of a bona fide constitutional claim that an otherwise discretionary exercise of state power is in reprisal for the exercise of First Amendment freedoms.

In *Perry v. Sinderman,* a teacher in the state college system alleged that his non-retention as a teacher was a result of public criticism of the Board of Regents. The Board of Regents claimed insubordination as the motivation for non-retention. The District Court granted summary judgment in favor of the Regents. The Court of Appeals reversed. Affirming the Court of Appeals, this Court held:

> In this case, of course, the respondent has yet to show that the decision not to renew his contract was, in fact, made in retaliation for his exercise of the constitutional right of free speech. The District Court foreclosed any opportunity to make this showing when it granted summary judgment. Hence, we cannot now hold that the Board of Regents' action was invalid.
>
> But we agree with the Court of Appeals that there is a genuine dispute as to "whether the college refused to renew the teaching contract on an impermissible basis – as a reprisal for the exercise of constitutionally protected rights." 430 F.2d at 943. The respondent has alleged that his non-retention was based on his testimony before legislative committees and his other public statements critical of the Regents' policies. And he has alleged that this public criticism was within the First and Fourteenth Amendments' protection of freedom of speech. Plainly, these allegations present a bona fide constitutional claim. For this Court has held that a teacher's public criticism of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis

> for termination of his employment. *Pickering v. Board of Education, supra.*
>
> For this reason we hold that the grant of summary judgment against the respondent, without full exploration of this issue, was improper.

408 U.S. at 598.

Similarly, the bona fide constitutional claims here, supported by undisputed facts and circumstances of departures from ordinary procedures adeptly marshalled by the dissent below, require full exploration of this issue. Because the decision of the State of New York Court of Appeals conflicts with this Court's decision in *Perry v. Sinderman,* and because of the importance of insuring that proof of bona fide constitutional claims is not improperly and prematurely foreclosed, the petition for certiorari should be granted.

3. The Decision Below Conflicts With The Decision Of This Court Requiring A Compelling Justification For Disparities In Treatment Based Upon Religious Affiliation Or Political Belief.

The Equal Protection Clause of the Fourteenth Amendment and the Religion Clauses of the First Amendment require that any classification affecting religious organizations must be meticulously surveyed to eliminate "religious gerrymanders". *Walz v. Tax Commission,* 397 U.S. 664, 696 (1970) (Harlan, J. concurring). If the purpose of a classification is to aid or inhibit a religion, or aid one religion over another, or if the classification has the effect of doing so, it cannot be upheld unless the disparity in treatment is mandated by compelling reasons. *Committee for Public Education v. Nyquist,* 413 U.S. 756 (1973); *Lemon v. Kurtzman,* 403 U.S. 602 (1971). Similarly, ad-

ministrative decisions, neutral on their face but motivated by racial or religious animus, cannot survive. *Yick Wo. v. Hopkins,* 118 U.S. 356 (1886).

Petitioners stand alone as the only applicants ever to have been denied an application for provisional charter on the grounds advanced. As members of a small and unpopular religion, they claim that the New York Education Law as applied under the circumstances of this case violated the constitutional principle of religious neutrality. Petitioners claim that the Board of Regents engaged in an unprecedently attenuated investigation into the beliefs and practices of the Church, characterized by repeated and unjustified delays in the search for a reason to deny the application. Petitioners also claim that the Board ultimately based the denial of the application for a provisional charter on deficiencies which had been overlooked in other similarly situated applicants. The petitioners assert that the proffered rational basis for the decision was a pretext for religious discrimination. In support of this assertion, petitioners submitted the affidavit of Commissioner Nyquist, who was personally involved in investigating, evaluating, reviewing and supervising hundreds of applications for provisional charters including that of petitioners. He stated:

> To my own personal knowledge (a) the Board of Regents ha[s] chartered institutions with greater deficiencies and/or fewer strengths than the Seminary possesses;
>
> (b) the Seminary has been subjected to greater scrutiny and has been held to higher requirements than other applicants for a Provisional Charter; and

> (c) the Board of Regents has never before delayed a decision for an application for Provisional Charter for such an extended period of time when its consultants, staff and counsel recommend approval.

(See App. A, *infra*, 14-15a.)

He stated that in his 25 years of experience in the State Department of Education, the Board of Regents had never required an audited financial statement, now a prime basis for the Board's denial of the application. The request for an audited financial statement was in any event highly suspect, since the land alone on which the Seminary was located (which the Church had agreed to grant to the Seminary upon its obtaining a provisional charter) was by the report of the Education Department staff determined to be worth, net of mortagages, twice the minimum amount ($500,000) of assets required by statute to be obtained by the educational institution by the *end* of the provisional chartering period. The Board had also said that the confidentiality of the financial statement could not be guaranteed.

The court below justified the unprecedented length and breadth of the investigation by noting that "substantial public concern about the religious or political practices of the Seminary's sponsoring organization had been voiced by state and federal legislators, members of the clergy and others." (App. A, *infra*, 9a.) But such exertion of public pressure and concerns about the practices of the Seminary's sponsor can hardly form a compelling reason justifying the disparity in processing petitioners' application or holding petitioners to higher standards. These expressions heighten, rather than ameliorate the concern that the admitted disparity in treatment was not based upon religiously neutral determinations.

These litigants and other minority religions urgently need this Court's authority to insure the constitutional legacy of these most fundamental of freedoms. A minority religion must be permitted to grow and flourish and to create institutions dedicated to the proliferation of its beliefs, unfettered by disparate and discriminatory treatment at the hands of state administrators motivated by public pressure stemming from the unpopularity of the Church's beliefs and practices.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the State of New York Court of Appeals.

Respectfully submitted,

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October 22, 1981.

APPENDIX A

In the Matter of Michael Y. WARDER et al.,
Proposed First Trustees of the
Unification Theological Seminary.

Appellants,

v.

BOARD OF REGENTS OF the UNIVERSITY OF
the STATE OF NEW YORK,

Respondents.

(And Another Proceeding.)

Court of Appeals of New York.
June 11, 1981.

OPINION OF THE COURT

COOKE, Chief Judge.

Petitioners, proposed trustees of the Unification Theological Seminary, challenge as arbitrary the denial of a provisional charter by the Board of Regents. The Seminary, an educational institution in Barrytown, New York, is sponsored and financially supported by the Holy Spirit Association for the Unification of World Christianity ("Unification Church"), a religious organization incorporated in California in 1961. Since 1975, the Seminary has offered a two-year graduate program of religious education. Seeking incorporation and the authority to confer Master of Religious Education degrees, petitioners applied to the Board of Regents and Commissioner of Education for a provisional charter. Following a lengthy investigation of the Seminary, its sponsor and the educational program offered, the application was denied.

A review of the proceedings is necessary in order to evaluate petitioners' claims. The provisional charter application was submitted in April, 1975. The State Education Department reviewed the application, investigated the Seminary and, in June, 1976, the Deputy Commissioner of Higher and Professional Education issued a report favorable to the Seminary but recommending that action be deferred in light of pending and anticipated investigations of the parent organization. In the fall of 1976, in accordance with Education Department practice, the Seminary was evaluated by two independent consultants. The consultants, while noting certain areas of concern, recommended approval. By February, 1977, the office of counsel for the State Education Department, the Deputy Commissioner of Higher and Professional Education and the Commissioner of Education had recommended approval of the application, which was then forwarded to the Board of Regents for action at the February, 1977 meeting. No action was taken at that time.

In March of that year, legislative resolutions cited recently publicized concern about the policies and practices of the Unification Church and requested the Board of Regents to delay its decision pending investigation. The matter was deferred again following the April meeting of the board, at which Regents Yavner and Griffith, during debate, expressed concern about provisional charter approval, in light of unresolved questions as to faculty and programs and the charges against the Unification Church of involvement and Korean Central Intelligence Agency (KCIA). They were also concerned about charges that the church and its leaders engaged in or encouraged brainwashing and deceptive practices. Yavner commented critically on the book containing the religious tenets of the church and was of the opinion that it was a political as well

as religious document. Griffith went further to express disapproval of the purposes and activities of the church, which he felt were incompatible with the principles of our society. Yavner moved to delay a decision pending a further review by a committee of Regents appointed by the board. The motion carried and Regents Genrich, who would have granted approval and voted against delay, and Yavner together with Bongiorno, another Regent, were appointed to the committee.

Petitioners, dissatisfied with the progress on the Seminary application, commenced an article 78 proceeding in July, 1977 to compel a decision. The proceeding was dismissed upon a determination that the delay was not unreasonable.

In mid-November, 1977, the Regents commmittee issued a preliminary progress report summarizing the information it had obtained. As to the academic questions, the report summarized the reports of the original consultants and another independent consultant, all of which found the program, facilities and administration adequate. As to the related issues, the committee as yet had found no evidence of a link between the Seminary and the Korean government or KCIA, or of brainwashing at the Seminary or by members of the Unification Church. The committee noted that further investigation by it was necessary because pending investigations by other governmental agencies had not been completed. Furthermore, information obtained by the committee raised questions concerning the Seminary's stability, financing plan and dependence upon the Unification Church as its source of income, and the church's alleged policy of deception in fundraising and recruitment. The Seminary was to be questioned on these matters and given an opportunity to respond.

Petitioners thereafter were requested to furnish affidavits concerning KCIA involvement, recruitment and fundraising techniques of the Unification Church and an audited financial statement from the Church. The Education Department, under the direction of the committee, issued a staff report on December 7, 1977, which noted that it was still awaiting responses to some of the questions raised in the previous report. The staff also had confirmed that the Unification Church of New York, Inc., the organization upon which the Seminary was to rely for financial support through a lease arrangement, had become inactive, having transferred the majority of its assets and liabilities to the California organization. A request was outstanding for the submission of an alternative financing plan. The staff stated that evidence, in the form of affidavits and statements from former church members, was unavailable concerning deceptive practices used by church members in fundraising and recruitment but that there was no evidence of advocacy of illegal activities by leaders of the church or petitioners or at the Seminary and no evidence that the Seminary, petitioners or Unification Church were involved with the KCIA.

Before the December 1977 meeting of the Board of Regents, petitioners were provided with copies of and invited to respond to the information that had been received by the committee. The December meeting produced a decision to defer action on the application in light of the receipt of additional allegations against the church and Seminary, including representations of deception concerning the Seminary program and noncompliance with admissions and program requirements established by the Seminary. Petitioners were also informed that the financial statement of the Unification Church, the substituted lessee of Seminary property, was inadequate and were again requested to submit a statement in audited form.

Petitioners were informed on December 19 that a review team from the Education Department would visit the Seminary on December 20 to review its records. Following that visit, the Education Department and Regents committee recommended that the application be denied. The findings were that the Seminary had represented itself through brochures and transcripts as having degree-granting status, that the student records showed that some graduates had not completed the number of credits or courses represented by the Seminary to be required, that admissions requirements set up by the Seminary, such as submission of GRE scores, letters of recommendation, and undergraduate transcripts, had not been enforced and that no audited financial statement for the Unification Church had been submitted.

Petitioners were given the opportunity to respond to the committee report and submitted denials of and explanations for the perceived deficiencies, including oversight, program evolution and practical difficulties. The Board of Regents, at the January, 1978 meeting, again deferred action to allow the Education Department to consider petitioners' response. The Education Department and Regents committee issued a final report in February, which addressed issues disputed in petitioners' response, found the explanations inadequate to remove concern over the deficiencies and adhered to its recommendation for denial. At the February meeting of the board, that body voted unanimously to deny the application based on the findings and conclusions of the Regents committee reports.

Petitioners commenced the second article 78 proceeding challenging the determination as arbitrary on numerous grounds, including bias, administrative abuse and the application of imprecise standards. Respondents' motion for

summary judgment was granted and the petition dismissed. Petitioners appealed this judgment and the judgment in the first article 78 proceeding to the Appellate Division, 75 A.D.2d 666, 426 N.Y.S.2d 849. That court affirmed both judgments, concluding that the delay in the decision was not unreasonable and that no constitutional rights had been violated by the investigation or determination. Petitioners were granted leave to appeal to this court.

Petitioners maintain that the Board of Regents determination should be annulled as arbitrary because it represents an abuse of the administrative process and the violation of petitioners' substantive and procedural rights, and because the statutes, rules and regulations under which the Board of Regents acted are unconstitutionally vague. Finally, petitioners urge that summary judgment was improper on this record. Their contentions are not persuasive.

It is well settled that in reviewing administrative action a court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious (see *Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222, 231, 232, 356 N.Y.S.2d 833, 313 N.E.2d 321). Deference to the judgment of the agency, when supported by the record, is particularly appropriate when the matter under review involves a factual evaluation in the area of the agency's expertise (see *Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459, 426 N.Y.S.2d 454, 403 N.E.2d 149). These principles in mind, it is concluded that the determination to deny has a rational basis.

The Education Department discovered serious inconsistencies between the Seminary's practice and the method

by which it represented it would operate. Student records did not accurately reflect work done and admissions and program standards set up by the Seminary were not adhered to or were changed without publication or notification to the department (see 8 NYCRR 52.2[d], [e], 52.1[b], [e]). The erroneous impression was given that the Seminary had degree-granting status (see Education Law, § 224). The records at the very least evidence inadequate administration. Although the Seminary explained certain inconsistencies, neither the department nor the board was bound to adopt the explanations as sufficient to dispel the impression of poor administration and conduct of the academic program. Finally, following the discovery that the original sponsoring organization had been substituted, the Seminary failed to submit audited financial statements for the substituted organization as requested. Thus, the Seminary failed to submit audited financial statements for the substituted organization as requested. Thus, the Seminary failed to satisfy the board of its financial resources (see Education Law, § 218). These deficiences rationally could be considered contrary to the standards necessary for charter approval.

Unable to challenge the determination on the basis of the findings, petitioners mount a broad-based attack on the entire decision-making process as abusive and unlawful and urge that the findings were contrived to mask the board's predetermined decision to deny the provisional charter.

Initially rejected is petitioners' argument that the investigation was overbroad, unjustified and impinged upon their associational and religious freedoms. The Board of Regents is charged with broad policy-making responsibility for the State's educational system (Education Law, §

207) and is specifically empowered to charter institutions of higher education (Education Law, §§ 216, 217). In the meaningful discharge of those functions and to "encourage and promote education" (Education Law, § 201), the Regents ensure that acceptable academic standards are maintained in the programs offered (see *Moore v. Board of Regents of Univ. of State of N.Y.*, 44 N.Y.2d 593, 407 N.Y.S.2d 452, 378 N.E.2d 1022). Thus, before an institution may be admitted to the academic community with degree-granting status it must meet established standards (see 8 NYCRR 3.21, 3.22, 52.1, 52.2); its purposes must be "in whole or in part, of educational or cultural value deemed worthy of recognition and encouragement" (Education Law, § 216). Given the broad responsibility of the Board of Regents for the quality of education provided in this State, it must be given wide latitude to investigate and evaluate institutions seeking to operate within the system.

It is here urged that the board transgressed permissible limits when it delayed decision beyond February, 1977 to engage in a broad investigation of the policies and practices of the Seminary and its sponsor, even after the favorable recommendations of the Education Department and consultants. Acceptance of this argument in the face of the record would place an unwarranted restriction on the board's power to discharge its responsibility to the people of this state. The board was not bound by the initial recommendations of the Education Department and the consultants. Areas of concern in the Seminary program identified in the consultants' reports, such as the extent of faculty accessibility and unclear program objectives and intent, reasonably and justifiably could prompt a request by the board for further study and evaluation. In addition, at the time the application was first submitted to the board

for action, substantial public concern about the practices of the Seminary's sponsoring organization had been voiced by State and Federal legislators, members of the clergy and others. Reports of KCIA involvement, brainwashing and encouragement of deceptive fundraising and recruitment practices were widespread. The board had a right to investigate the serious allegations of illegal or unethical conduct on the part of the Seminary sponsors and determine whether the Seminary participated in or encouraged such conduct.

Petitioners do not and cannot dispute that the board validly could deny a provisional charter to an institution that engaged in "brainwashing" and deception. That the broad investigation revealed no evidence of such practices does not mean that it was improperly undertaken in the first instance. The board cannot now be faulted because it discharged its responsibility for ensuring ethical educational programs of quality and in the process discovered serious deficiencies in the conduct of the academic program.

Petitioners also contend that the board's treatment of the Seminary was discriminatory and infected with bias. Relying on the affidavit of former Education Commissioner Nyquist, they contend that no other applicant has been subjected to such intensive investigation or denied a charter for the deficiencies found. No factual question of discrimination has been raised on this record. Indeed, the only basis for the charge is the Nyquist affidavit, which only conclusorily asserts these statements based on his 25 years experience in the department and his opinion of discriminatory treatment. This is not enough. The applicant's program deficiencies were amply demonstrated. Nor was it discriminatory to require an audited financial statement of the Unification Church.

While the seminary initially satisfied the Education Department of its financial stability, it did so on the basis of the original financing plan, which relied on the backing of the Unification Church of New York, Inc. Without notice to the department, the plan was changed by substituting the California organization for the now inactive New York corporation. In light of this background, the request for an audited rather than unaudited financial statement was not unreasonable and cannot be termed discriminatory.

Petitioners also maintain that the Board of Regents was biased and unable to render an impartial decision. Of course, an applicant is constitutionally entitled to unprejudiced decisionmaking by an administrative agency (see *Withrow v. Larkin*, 421 U.S. 35, 46-47, 95 S.Ct. 1456, 1464-1465, 43 L.Ed.2d 712; *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488). It follows that a determination based not on a dispassionate review of facts but on a body's prejudgment or biased evaluation must be set aside (see *Matter of Rotwein [Goodman]*, 291 N.Y. 116, 123, 51 N.E.2d 669). But a mere allegation of bias will not suffice. There must be a factual demonstration to support the allegation of bias and proof that the outcome flowed from it. Here, there is neither.

True, two Regents expressed strong opposition to charter approval for the Seminary during the April, 1977 board meeting, noting the charges of political activity, brainwashing and deception. But it was at that same meeting that these Regents requested further investigations. Only one, Regent Yavner, became a committee member. Of the two other members, one was equally outspoken in favor of charter approval. The reports from that committee were frank with respect to the lack of

evidence found to substantiate the charges. The Regents' comments, in the context in which they were made and in the light of subsequent actions of the committee and the board, do not evidence an inability on the part of the particular Regents or the whole board to make an unbiased evaluation of the application once all the facts were in (see *Federal Trade Comm. v. Cement Inst.*, 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010). Nor is it a question of fact raised as to bias by the isolated statement allegedly made by an unnamed member of the December, 1977 review team that the controversy was political rather than academic and that the team had come to "find" a basis for the decision about to be made by the board. The source of this statement is unnamed and the facts upon which the statement was based are undisclosed. Such a bare assertion does not establish a fact question warranting denial of summary judgment.

Petitioners also maintain that the statutes, rules and regulations under which the board acted are unconstitutionally vague and lacking in objective standards. This court has not hesitated to annul a determination predicated on rules and regulations that allow wholly subjective decisionmaking without adequate "safeguards against the exercise of arbitrary power or simple unfairness" (*Matter of Nicholas v. Kahn*, 47 N.Y.2d 24, 34, 416 N.Y.S.2d 565, 389 N.E.2d 1086; *Matter of Levine v. Whalen*, 39 N.Y.2d 510, 519, 384 N.Y.S.2d 721, 349 N.E.2d 820). Here, however, no such unrestrained power is evident. Rather, the scheme for provisional charter approval is integrated with that for program registration and provides sufficiently objective standards to enable meaningful judicial review (see Education Law, §§ 216, 217, 218; 8 NYCRR 3.21, 3.22, 13.1, 52.1, 52.2; see, also, *Moore v. Board of Regents of Univ. of State of N.Y.*, 44

N.Y.2d 593, 407 N.Y.S.2d 452, 378 N.E.2d 1022, *supra*). It must be remembered that in the area of determinating qualifications for educational institutions, where the nature and quality of programs necessarily will vary, precise criteria cannot be expected or demanded. The statutes and regulations at issue here offer sufficiently concrete guidelines and standards for judging an applicant to prevent the unfettered or arbitrary exercise of discretion.

The record reveals that no material factual question has been raised by petitioners concerning bias or an abuse of the administrative process. Petitioners were not denied due process by the procedures employed. Summary judgment was properly granted.

Accordingly, the orders of the Appellate Division should be affirmed, with costs.

JONES, Judge (dissenting).

While I would agree with the majority's conclusion that there exists a rational basis in the record sufficient to sustain the Board of Regents' determination denying petitioners' application for a provisional charter were that the only issue, I cannot agree that there was not a tender of proof sufficient, on a motion for summary judgment, to require a hearing on the issue of administrative abuse, which, if found to have occurred might be judged to have vitiated what would otherwise have been accepted as a rational determination.

It is well settled that summary judgment is a drastic remedy, to be granted only when it appears that no material and triable issues of fact are presented (e.g., *Glick & Dolleck v. Tri-Pac Export corp.*, 22 N.Y.2d 439, 293 N.Y.S.2d 93, 239 N.E.2d 725). While mere conclusory

allegations will never suffice to defeat a motion for summary judgment (e.g., *Shaw v. Time-Life Records,* 38 N.Y.2d 201, 379 N.Y.S.2d 390, 341 N.E.2d 817; *Capelin Assoc. v. Glove Mfg. Corp.*, 34 N.Y.2d 338, 357 N.Y.S.2d 478, 313 N.E.2d 776), where there is doubt as to the existence of such issues, or even if the issues are "arguable", summary judgment should not be granted (*Barrett v. Jacobs*, 255 N.Y. 520, 175 N.E. 275). to avoid the imposition of the drastic remedy, the motion's opponent must tender proof of facts sufficient to require a trial of any issue of fact (CPLR 3212, subd. [b]; *Friends of Animals v. Associated Fur Mfrs.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790, 390 N.E.2d 298). In this case, petitioners have met this burden.

Petitioners contended they were denied their right to an impartial administrative consideration of their application. Specifically, they assert that the Board of Regents, or at least certain of its members, were biased, and that the board prejudged their application for a provisional charter and otherwise abused the administrative process in a calculated effort designed to prevent certification of the Unification Theological Seminary. In support of these contentions, over 600 pages of exhibits, affidavits, letters and other documentary proof were tendered, a sampling of which illustrates that petitioners made a sufficient factual showing to entitle them to present this branch of their case at a full hearing.

There was before Special Term an affidavit of former Commissioner of Education Ewald B. Nyquist, who had been Commissioner of Education for a period of over seven years and during more than 25 years' service with the Department of Education had been "directly involved in investigating, evaluating, reviewing and supervising the processing of applications from numerous institutions

which applied for Provisional Charters", and who was commissioner at the time of petitioners' application. On the basis of such experience and with personal knowledge of a substantial portion of the investigation, evaluation and review of petitioners' application and individual participation in the decision-making process related thereto prior to June 30, 1977, he stated, inter alia: that "members of the Board of Regents and staff of the State Education Department * * * acted in an arbitrary, capricious and discriminatory manner"; that they "delayed making a decision on the application for an unconscionable length of time in the hope of uncovering negative findings on which to base a denial"; that "after almost two years of investigation and evaluation, *no reason existed for denial of the Seminary's application* nor did a reason exist for further delaying a decision", that "[m]embers of the Board of Regents had on numerous occasions discussed and expressed concern over various non-academic questions, including an alleged association between the leaders of the Unification Church and the Korean Central Intelligence Agency, alleged deceptive practices of the Unification Church, alleged brainwashing techniques employed by the Unification Church"; that "the Board of Regents have chartered institutions with greater deficiencies and/or fewer strengths than the Seminary possesses"; that "the Seminary has been subjected to greater scrutiny and has been held to higher requirements than other applicants for a Provisional Charter"; that "The Board of Regents has never before delayed a decision for an application for Provisional Charter for such an extended period of time when its consultants, staff and counsel recommended approval"; that "[o]ne of the reasons stated as a ground for denial was the lack of demonstration of necessary financial resources * * * [based on the] failure to submit audited financial statements": and that "[i]n my over

twenty-five years with the State Education Department the submission of an audited financial statement by a sponsoring entity was *never* a requirement to demonstrate adequate financial resources of the applicant."

Also tendered were excerpts from the journal of the April, 1977 meeting of the Board of Regents which included the statement of Regent Griffith that "The Unification Church is a political arm of the South Korean government (which I consider to be totalitarian) and possibly of the South Korean CIA", and that "I disapprove of the Church's purposes and activities. So I must, in logic and conscience, reiterate my disapproval of the charter for the Church's seminary."

There is an affidavit of David Sperling, who attended the April, 1977 meeting of the Board of Regents, attesting that Regent Yavner "accused the Unification Church and its leaders of engaging in 'brainwashing' " and stated that " 'if proof is needed, we need time to get that proof' ". Sperling further attested that Yavner stated he had read the *Divine Principle*, which contains the religious beliefs of the Unification Church, and found it "dangerous", analogizing it to Hitler's Mein Kampf.

The significance of these statements in context is revealed in the statement of Regent Clark: "I am not satisfied that the questions raised and the reasons offered in support of the motion to delay action upon this application justify any delay. This body has granted temporary certification to other applicants in the past without raising these types of questions. In regard to this application, it is my personal belief that serious questions of discrimination, civil liberties and first amendment issues were at stake."

The record also contains a copy of the March 22, 1977

Joint Resolution of the New York State Legislature directed to the Board of Regents memorializing them to delay action on petitioners' application because "the Unification Church and its founder, Reverend Sun Myung Moon have made headlines recently for alleged sophisticated brainwashing techniques on young people luring them away from family and community ties."

There was a letter to petitioner's attorney from the counsel to the Board of Regents dated six days prior to the December, 1977 meeting of the Board of Regents revealing the existence of six letters and affidavits adverse to the Unification Chruch, some dated months earlier and all unsubstantiated, giving petitioners five days to respond.

There was also an affidavit by the dean of the Unification Theological Seminary attesting that a Department of Education "review team" conducted an on-site inspection of the Seminary records on December 20, 1977 with almost no forewarning at a time when the school registrar and other staff familiar with the recordkeeping system were away for the holidays.*

Finally, there was proof that substantially all of the reasons ultimately articulated in the final report of the Regents recommending denial of petitioners' application were developed in the last two months of the 34-month period of investigation and review, primarily from information garnered during the on-site inspection of December 20, 1977, and that prior to that time no reasons had been identified for denying the application.

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*An unidentified person at the Seminary had been contacted by telephone on December 19 at 4:30 P.M. by Dr. Tubbs of the Department of Education who stated that five staff members would arrive the following morning at 9:00 A.M. to conduct an inspection.

This tender of proof in admissible form, although clearly subject to contravention and to explanation, denigration and even demolition as to probative significance, in the context of the undisputed facts that the application was initially submitted April 29, 1975, that in the course of the following 30 months of investigation the departmental reports were uniformly favorable to the application and no ground had been advanced to support its denial, and that it was not until after the hastily announced visitation of December 20, 1977 that articulable grounds were specified on which the application was denied, showed facts sufficient to reqire a trial as to whether the investigative procedures and decision-making process of the Board of Regents was infected with such bias, prejudice or predisposition to ultimate determination as to call for the vacatur of what would otherwise have been a rational determination by the administrative agency charged with responsibility therefor and vested generally with broad discretion in connection therewith. I would deny respondents' motion for summary judgment seeking as it does to obviate the necessity for a full evidentiary hearing to which petitioners have demonstrated that they are entitled.

FUCHSBERG, Judge (dissenting).

Besides concurring in the dissent-in-chief, I add this comment for myself:

Presented in this proceeding is a sharp issue as to whether the board acted solely to discharge its responsibility for ensuring educational programs of quality or whether, on the bases summarized so well by Judge JONES, its judgment was colored by the beliefs and practices of the petitioners. Without reflecting on the ultimate merits, suffice it to say that there is enough shown by each

side to make it salutary as well as mandatory that the facts be aired in the plenary and pensive atmosphere of a full hearing. One would think that those who undertook the unprecedentedly attenuated administrative investigation in this case would themselves welcome the opportunity to dissipate the cloud that might otherwise attach to their determination. Whether the petitioners enterain beliefs that may be disturbing to a majority of the residents of our country is besides the point. As I see it, my duty as a Judge, as was that of the Regents, is to apply the law, in all its strength, equally to those whose philosophies are popular or those whose are not.

JASSEN, GABRIELLI and WACHTLER, JJ., concur with COOKE, C.J.

JONES, J., dissents and votes to reverse in a separate opinion in which FUCHSBERG and MEYER, JJ., concur.

FUCHSBERG, J., dissents in another dissenting opinion.

Orders affirmed.

APPENDIX B

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION
Third Judicial Department

PRESENT:

HON. A FRANKLIN MAHONEY
Presiding Justice,
HON. LOUIS M. GREENBLOTT
HON. ROBERT G. MAIN
HON. ANN T. MIKOLL
HON. JOHN T. CASEY
Associate Justices.

ORDER
County Clerk's
Index No
10166-78

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 5th day of February, 1980.

MICHAEL YOUNG WARDER, NEIL ALBERT SALONEN, EDWIN ANG, DAVID S. C. KIM, BO-HI PAK, SUN MYUNG MOON, JOSEPH A. TULLY, WILLIAM BERGMAN, and MOSE DURST, as proposed First Trustees of Unification Theological Seminary,

Appellants,

against

THE BOARD OF REGENTS OF THE STATE OF NEW YORK AND GORDON M. AMBACH, AS COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Respondents,

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules.

Appellants above-named having appealed from a judgment of the Supreme Court of Albany County entered on the 14th day of November, 1978 in the Office of the Clerk of the County of Albany and said appeal having been

presented during the above stated term of this Court and having been argued by O'Connell and Aronowitz, attorneys for appellants, Peter L. Danziger, Esq., of counsel, and by Robert D. Stone, Esq., attorney for respondents, by Donald O. Meserve, Esq., of counsel for respondents, and, after due deliberation, the Court having rendered a decision on the 10th day of April, 1980, it is hereby

Ordered that the judgment so appealed from be, and the same hereby is, affirmed, without costs.

ENTER:

/s/John J. O'Brien
Clerk

DATED AND ENTERED: May 12, 1980

A TRUE COPY
/s/John J. O'Brien
Clerk

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION
Third Judicial Department

April 10, 1980l

36216
36209

In the Matter of MICHAEL YOUNG WARDER *et al.*,
Appellants,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK *et al.*,
(Proceeding No.1.) *Respondents.*

In the Matter of MICHAEL YOUNG WARDER *et al.*,
Appellants,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK *et al.*,
(Proceeding No. 2.) *Respondents.*

Appeal, in Proceeding No. 1, from a judgment of the Supreme Court at Special Term (Staley, Jr., J.), entered November 14, 1978 in Albany County, which dismissed petitioners' application in a proceeding pursuant to CPLR article 78, to compel respondents to issue a determination on petitioners' application for a provisional charter to operate an academic institution.

Appeal, in Proceeding No. 2, from a judgment of the Supreme Court at Special Term (Conway, J.), entered November 14, 1978 in Albany County, which dismissed

petitioners' application, in a proceeding pursuant to CPLR article 78, to annul respondents' determination which denied petitioners' application for a provisional charter to operate an academic institution.

The two proceedings herein arise out of the same controversy, and, accordingly, we will consider them together in this decision.

Petitioners are the proposed first trustees of the Unification Theological Seminary, which has been operated in Barrytown, New York, since 1975, as an unaccredited institution by the Holy Spirit Association for the Unification of World Christianity, i.e., the Unification Church. In April of 1975, pursuant to article 5 of the Education Law, petitioners applied to respondent Board of Regents for a provisional charter for the institution without which they could not obtain the legal authority to confer Master of Religious Education degrees upon graduates of the seminary. The Regents had made no determination concerning petitioners' application by July of 1977, however, and, contending that the decision thereon had been unreasonably delayed, petitioners commenced a CPLR article 78 proceeding to compel the Regents to act (Proceeding No. 1). In a decision dated November 28, 1977, Special Term (Staley, Jr., J.) ruled that the delay was not unreasonable under the circumstances presented and that the petition should be dismissed.

No order was immediately entered on this decision, however, and on February 22, 1978 the Regents ultimately denied petitioners' application for a provisional charter. As a result, petitioners instituted a second CPLR article 78 proceeding to review the Regents' decision on the merits (Proceeding No. 2), and by decision mailed September 13, 1978, Special Term (Conway, J.) held that a rational basis

existed in the record for the Regents' determination, and, consequently, granted respondents' cross motion for summary judgment dismissing the petition. Orders in both of the instant proceedings were subsequently signed on October 18, 1978 and entered in Albany County on November 14, 1978, and petitioners now appeal therefrom.

Considering initially the appeal in Proceeding No. 1, we hold that the order of dismissal therein should be affirmed. Since the Regents have, as noted above, made a final determination of petitioners' request for a provisional charter, the subject matter of this dispute has been rendered moot and academic in all respects except for the fact that petitioners do not want Special Term's ruling that the Regents' delay in making a determination was reasonable to be binding in petitoners' challenge to the determination in Proceeding No. 2 on the merits. That being so, petitioners have preserved the issue of the reasonableness of the delay by their appeal in Proceeding No. 1, but upon our review of the record we nonetheless conclude that Special Term's ruling relative to the delay should not be disturbed. Not only is the Board of Regents a body of professional persons who meet only about once a month (8 NYCRR 3.1 [b]), but also in March of 1977 the State legislature in a joint resolution requested that the board stay consideration of petitioners' application for a charter until extensive investigations and public hearings were held regarding the activities of the Unification Church and its founder, Reverend Sun Myung Moon. Furthermore, an examination of the records in these proceedings readily reveals that the Regents had a large volume of material to consider in ruling on petitioners' application, and also, there has been no showing that the Regents engineered the subject delay in bad faith (cf.

British Airways v. *Port Authority of New York and New Jersey,* 564 F.2d 1002)j. With these circumstances prevailing, the petition in Proceeding No. 1 was properly dismissed.

Turning now to the second proceeding, we agree with Special Term that there is a rational basis in the record for the Regents' denial of a provisional charter to petitioners. On this issue, we note that the financial base of the seminary was unnecessarily [sic] brought into question when the State Education Department was not initially apprised by petitioners of the transfer of the assets of the Unification Church of New York Inc., which was originally intended to provide the seminary's financial support, to the Unification Church of America, a California corporation which is now supposed to provide the needed financial backing. Moreover, when they were later requested by the Regents to do so, petitioners also refused to provide an audited financial statement of the California corporation (see Education Law,§ 218; 8 NYCRR 3.21[a]; 8 NYCRR 52.2[a]). Additionally, there is further evidence that petitioners falsely represented that the seminary was qualified to grant degrees even after being warned not to do so, that the seminary actually prepared and issued transcripts indicating that masters degrees had been awarded to its graduates and that the Registrar of the seminary failed to maintain adequate records relative to the academic progress of students at the seminary. Upon such a record as this, there is clearly substantial evidentiary support for the Regents' denial of a provisional charter to petitioners, and, consequently, the Regents' decision to that effect has a rational basis.

That being so, this deicsion must be sustained unless the procedures followed by the Regents in making their deter-

mination were somehow legally insufficient (*Matter of Pell* v. *Board of Educ.*, 34 N Y 2d 222) and we conclude that they were not. In their challenge to the legal basis of the determination, petitioners initially argue that sections 216, 217 and 218 of the Education Law and sections 3.21 and 3.22 of the Rules of the Board of Regents (8 NYCRR 3.21, 3.22), which regulate the granting of provisional charters, are unconstitutional because they contain no objective standards and fail to provide an applicant with notice of the requirements to obtain a charter. We find this contention to be without merit, and, in so ruling, would note that, in considering an application for a provisional charter, the Regents must act in an area where rigid formulas and definitive rules are feasible or even desirable and where the Regents must exercise their collective professional judgment, and applicants are chargeable with knowledge of the more commonly accepted standards by which they will be judged (cf. *Moore* v. *Board of Regents*, 59 AD 2d 44, affd. 44 NY 2d 593). Moreover, we would further emphasize that an examination of the above-cited statutes and rules and also Rules 3.23, 3.46 and 3.47 of the Board of Regents (8 YYCRR 3.23, 3.46, 3.47) and Regulations 52.1 and 52.2 of the Commissioner of Education (8 NYCRR 52.1, 52.2) readily reveals that, taken together, they contain adequate guidelines relative to the operation of an academic institution so that applicants for a charter such as petitioners have sufficient notice of the standards which they must meet.

Similarly without merit is petitioner's contention that the Regents' determination must be annulled because two members of the board were biased and prejudged the facts with regard to the charter application, thereby denying petitioners due process of law. While there is evidence in the record that at a board meeting in April of 1977,

Regents Griffith and Yavner expressed misgivings as to the policies and operation of the Unification Church and as to the advisability of granting a charter to a seminary operated by that church, such misgivings must be juxtaposed with those of the Legislature as evidenced by the joint resolution noted above. Furthermore, Griffith and Yavner both indicated in their statements not that the charter application could not be approved, but rather that further investigation of the matter was needed. Under these circumstances, there has been no showing that Regents Griffith and Yavner could not objectively consider the charter application on its own merits with their individual judgments unaffected by extraneous matters prejudicial to petitioners' cause (cf. *Hortonville Joint School Dist.* v. *Hortonville Education Assn.*, 426 U.S. 482).

Petitioners' remaining arguments are likewise lacking in substance. There has been absolutely no showing that either the Education Law or petitioners' freedom of association has been violated by the Regents in making their determination herein. Additionally, petitioners have not been denied equal protection of the law merely because their application was closely scrutinized, and the Regents did not violate the Open Meetings Law by holding an executive session to discuss pending litigation (see Public Officers Law, § 100, subd. [d]). Lastly, we find that summary judgment was properly granted to respondents because no material factual issues have been presented which would have necessitated a hearing.

In sum, our consideration of the voluminous records in these proceedings has led us to conclude that this charter application has been thoroughly and properly investigated and that petitioners have been afforded a fully and fair opportunity to present their case in support of the application. Most significantly, it is also clear that the application

was denied because the seminary failed to meet the academic and financial requirements essential for the issuance of a charter.

Judgments affirmed, without costs.

MAHONEY, P.J., GREENBLOTT, MAIN, MIKOLL and CASEY, JJ., concur.

APPENDIX C

At a Special Term, Part 1 of the Supreme Court of the State of New York, held in and for the County of Albany, at the County Courthouse, in the City of Albany, on the 22nd day of July, 1977.

JUDGMENT
Index No. 10168-78

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

PRESENT: HON. ELLIS J. STALEY, JR.
Justice

MICHAEL YOUNG WARDER, NEIL ALBERT SALONEN, EDWIN ANG, DAVID S.C. KIM, BO-HI PAK, SUN MYUNG MOON, JOSEPH A. TULLY, WILLIAM BERGMAN, and MOST DURST, as proposed First Trustees of the Unification Theological Seminary,

Petitioners,

against

THE BOARD OF REGENTS OF THE STATE OF NEW YORK and GORDON AMBACH, as Commissioner of Education of the State of New York,

Respondents.

For an Order and Judgment Pursuant to Articel 78 of the CPLR.

Petitioners above named, by their attorneys, O'Connell and Aronowitz, Esqs., having commenced a Special Proceeding pursuant to Article 78 of the Civil Practice Law and Rules for an order compelling respondents to act immediately and at the next regularly scheduled meeting of the Board of Regents to either grant or deny petitioners' application for a provisional charter and for authority to offer a masters degree program, and in the event of a denial to require respondents to specifically set forth in

writing each and every reason for denial and the minimum requirements for approval, and respondents by their attorney, Robert D. Stone, having raised objections in point of law and having answered the petition, and said proceeding and objections having regularly come on to be heard before me, at a Special Term of this Court on July 22, 1977, and Peter L. Danziger having appeared of counsel for petitioners and Donald O. Meserve having appeared of counsel for respondents, and after due deliberation,

NOW upon reading and filing the order to show cause signed by the Hon. Edward S. Conway, July 12, 1977, the petition verified the same day and exhibits thereto, the objections in point of law and answer verified July 20, 1977 and exhibits thereto, the affidavit of Correlius D. Murray sworn to July 20, 1977 and exhibits thereto, and upon the written decision of this Court dated November 28, 1977, it is

ORDERED, ADJUDGED AND DECREED that the petition is hereby dismissed on the merits.

/s/ Hon. Ellis J. Staley, Jr.
Justice of the Supreme Court

DATED: October 18, 1978

ENTER: November 14, 1978

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

MICHAEL YOUNG WARDER, NEIL ALBERT SALONEN, EDWIN ANG, DAVID S.C. KIM, BO–HI PAK, SUN MYUNG MOON, JOSEPH A. TULLY, WILLIAM BERGMAN, and MOSE DURST, as proposed First Trustees of the Unification Theological Seminary,

Petitioner,

against

THE BOARD OF REGENTS OF THE STATE OF NEW YORK and GORDON AMBACH, as Commissioner of Education of the Stte of New York,

Respondents.

For an Order and Judgment Pursuant to Article 78 of the CPLR.

Supreme Court, Albany County, Special Term, July 22, 1977 Calendar #54

JUSTICE ELLIS J. STALEY, JR., PRESIDING

APPEARANCES:

O'Connell & Aronowitz, P.C.
Attorneys for Petitioners
100 State Street
Albany, New York 12207

Robert D. Stone, Esq.
Attorney for Respondents
New York State Education Department
Education Building
Albany, New York 12224

STALEY, JR., J:

This is a proceeding pursuant to CPLR article 78 for an order requiring the respondents to act immediately and without further delay, and at the Board of Regents next regularly scheduled meeting to either grant or deny the petitioner's application for a provisional charter.

On or about April 29, 1975, some of the petitioners submitted an application for a provisional charter for the incorporation of the Unification Theological Seminary to the Office of Counsel of the Department of Education. The staff at the Department of Education worked with some of the petitioners and their representatives in the preparation of the petition, and in the collection of the data and information which they felt was necessary for the proper evaluation of the petition.

In the month of February, 1977 the application was transmitted to the Committee on Administration and Law of the Board of Regents. On February 22, 1977, the application was considered at a meeting of the Committee on Higher and Professional Education of the Board of Regents at which time the Department of Education recommended approval. After discussion, it was determined that further information was required, and the application was tabled until the next meeting in March, 1977. The application was not considered at the March meeting and, at the meeting held on April 22, 1977, the Board of Regents resolved that a panel of Regents be appointed to study the questions concerning the application and submit an interim report at the July meeting, and a final report at the November meeting with final action by the Board of Regents to be taken at the December meeting of the Board.

The petition alleges that the Board of Regents has had

ample time to study the issues connected with the Seminary's application, and that the Board's refusal and failure to act on the application has caused and continues to cause irreparable and substantial damage to the Seminary. It is further alleged that the delay is illegal in that (1) the petitioners have compiled with all requests made on behalf of the Board; (2) representatives of the Board have inspected the facility and fully reviewed its curriculum, faculty, student body and resources; (3) the experts approved by the Board have conducted a detailed review and have unanimously recommended that a provisional charter be granted; (4) the Board's failure and refusal to act in either accepting or rejecting the application is a denial of due process of law and a deprivation of constitutional rights, including freedom of speech, religion and the right to exercise one's beliefs; and (5) the Board's failure and refusal to act prevents the Seminary from exercising its right of judicial review.

Respondents' answer alleges (1) that the authority of the Board of Regents to grant or deny a charger is discretionary; (2) that the application was first submitted to the Board at its meeting in February, 1977; (3) that questions were raised by some of the Regents concerning the proposed seminary, regarding its proposed resources, curriculum, faculty, manner of initial operation, and manner of operation and ability to operate in the future; (4) that the Board has the responsibility of determining to its own satisfaction that the proposed institution meets all of the requirements for a charter, as set forth in the Education Law; (5) that the Board has not yet resolved this important question; and (6) that the Board adopted a resolution at its April, 1977 meeting providing for a panel of experts to study the issues and report to the Board to enable the Board to carry out its responsibilities, and bring the matter to a conclusion as soon as reasonably possible.

A board, body or officer vested with power to determine an issue or question of fact may be compelled, pursuant to CPLR article 78, to determine the fact, but may not be compelled or directed to decide in a particular way. *(People ex rel. Harris v. Comrs. of the Land Office,* 149 N.Y. 26; *Matter of Stuart & Stuart v. New York State Liq. Auth.*, 29 A D 2d 176.)

Although this application was submitted to the Department of Education on April 29, 1975, it was not submitted to the Board of Regents until February, 1977. During this period of almost two years, the staff at the Department of Education worked with petitioners' representatives to collect the information and data essential to the evaluation of the petition prior to submission to the Board. Upon completion of the preliminary investigations, site inspections and reports, the petition was submitted to the Board.

The authority to grant a charter or provisional charter rests with the Board of Regents. Section 217 of the Education Law provides, in part, as follows:

"On evidence satisfactory to the regents that the conditions for an absolute charter will be met within a prescribed time, they may grant a provisional charter which shall be replaced by an absolute charter when the conditions have been fully met, * * * ."

The fact that the Department of Education has recommended approval does not, therefore, preclude the Board of Regents from making a further investigation before exercising their power to grant or deny a provisional charters. The Board of Regents is not a full time state agency, the members thereof meeting only once a month. Nothing in the Education Law or in the Board's regulations requires the Board to act within a specified time. There being no required period in which to act, the Board

would be required to act within a reasonable time considering all of the facts and circumstances. Here, questions were raised by some members of the Board concerning the educational program, the curriculum, faculty, textbooks, resources materials, the finances of the seminary, and the sponsoring agency by other government agencies. In March, 1977, the Legislature by resolution required the Regents to make further investigation. This expression of legislative concern is some justification for deferring action until the matter has been carefully considered.

Considering the makeup of the Board, the fact that it meets only once a month, the issues involved and the Board's obligations and duties under the Education Law, it does not appear that the delay involved here under the resolution adopted by the Board at its April 1977 meeting, is not [sic] unreasonable.

The petitioners point to the long period of time involved in obtaining information for preparation of the petition for submission to the Board, but they have not established that the action of the Board in requiring further investigation is unreasonable.

The petition is, therefore, dismissed.

Attorney for respondents to submit order.

All papers to the attorney for respondents for filing upon entry of the order herein.
Date: November 28, 1977.

APPENDIX D

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

PRESENT: HON. EDWARD C. CONWAY,
Justice

In the Matter of the Application

of

MICHAEL YOUNG WARDER, EDWIN ANG, DAVID S.C. KIM, WILLIAM BERGMAN and MOSE DURST, as proposed First Trustees of the Unification Theological Seminary,

Petitioners,

against

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK and GORDAN AMBACH, as Commissioner of Education of the State of New York,

Respondents,

For an Order and Judgment Pursuant to Article 78 of the CPLR.

At a special Term, Part I of the Supreme Court of the State of New York, held in and for the County of Albany, at the County Courthouse, in the City of Albany, on the 25th day of August, 1978.

Petitioners above named by their attorneys, O'Connell and Aronowitz, having commenced a special proceeding pursuant to Article 78 of the Civil Practice Law and Rules for an order compelling respondents to issue a provisional charter to the Unification Theological Seminary, and restraining respondents from interfering with the petitioners granting a masters degree to graduates of the Seminary and for other and further relief, and respondents by their attorney, Robert D. Stone having served objections in point of law and an answer and hav-

ing moved for summary judgment, and petitioners having filed a cross-motion to require respondents to submit a more definite answer, and said motions having come before this Court at Special Term on August 25, 1978, and Peter L. Danziger having appeared of counsel for petitioners, and Donald O. Meserve having appeared of counsel for respondents, and after due deliberation,

NOW upon reading and filing the notice of petition and petition verified June 21, 1978 and the appendix of exhibits thereto, the objections in point of law and answer verified August 16, 1978, the notice of motion for summary judgment and the supporting affidavit of Robert D. Stone, the reply verified August 24, 1978, the affidavits of David Sperling, Ewald B. Nyquist and Theresa M. Stewart, dated August 18, 21 and 24, 1978, the notice of cross-motion for a more definite answer and supporting affidavit of Peter L. Danziger, the affidavit on procedural matters of Donald O. Meserve, and upon the written decision of this Court dated September 13, 1978, it is

ORDERED, ADJUDGED AND DECREED that the respondents' motion for summary judgment is granted, and the petition is dismissed on the merits.

/s/Hon. Edward C. Conway
Justice of the Supreme Court

Dated: October 18, 1978
ENTER: November 14, 1978

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application
of

MICHAEL YOUNG WARDER, EDWIN ANG, DAVID S. C. KIM, WILLIAM BERGMAN and MOSE DURST, as proposed First Trustees of the Unification Theological Seminary,

Petitioners,

against

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK and GORDON AMBACH, as Commissioner of Education of the State of New York,
Respondents,

For an Order and Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

---

Supreme Court, Albany County Special Term,
August 25, 1978 Justice Edward S. Conway, presiding
(Calendar #19)

APPEARANCES:

O'CONNELL and ARONOWITZ, Esqs.
Attorneys for Petitioners
Peter L. Danziger, Esq., of Counsel
100 State Street
Albany, New York 12207

Robert D. Stone, Esq.
Attorney for Respondents
Donald O. Meserve, Esq., of Counsel
New York State Education Department
Education Building
Albany, New York 12224

CONWAY, J:

This is an Article 78 proceeding whereby petitioners seek an order: 1) annulling the determination of the respondents denying their application for a Provisional Charter as an institution of higher education, and 2) compelling the respondents to grant such a Provisional Charter.

Respondents cross-move for summary judgment dismissing the petition on the ground that the determination sought to be reviewed in this proceeding has a rational basis and is not affected by an error of law.

Petitioners, the proposed First Trustees of the Unification Theological Seminary, are and have been since 1975 operating the Unification Theological Seminary (hereinafter referred to as the Seminary). The Seminary conducts a program of religious education to its students at facilities located in Barrytown in Dutchess County, New York.

The Seminary is sponsored and financially supported by a religious organization incorporated in 1961 in the State of California and known as the Holy Spirit Association for the Unification of World Christianity (hereinafter referred to as the Unification Church). The Seminary is operating a two-year program of graduate study at Barrytown and seeks the authority to grant graduate degrees of Master of Religious Educatin as well as the aforementioned Provisional Charter.

In April of 1975, petitioners submitted an application to the Board of Regents (hereinafter referred to as the Board) for said Provisional Charter. The application was initially evaluated by the staff of the State Education Department with the assistance of two independent consultants jointly selected by the State Education Department and the Seminary. Both the staff and the consultants recommended approval of the application. The matter was submitted to the Board for its consideration in February, 1977.

The Board indicated a number of areas of concern which it felt required further consideration, and appointed a special committee of three Regents to look into the matter and report back to the full Board.

After further study and an additional visit to the Seminary to observe its actual operation, the State Education Department staff reversed its earlier favorable recommendation and recommended that petitioners application be denied. The Committee of Regents also recommended disapproval and the full Board voted to deny petitioners application by a vote of 13 to 0.

Petitioners contend that the final decision of the Board was illegal, arbitrary, capricious and discriminatory in

that the final decision was not based on any legal grounds but was instead the result of bias and prejudice.

This Court cannot agree with the contentions of the Petitioners. The ultimate facts upon which the Board's determination was based are set forth in the final report of the Committee of Regents dated February 22, 1978. The report summarizes the deficiences which led the Board to conclude that the Seminary does not meet the standards of operation of degree-granting institutions. For example, the Committee of Regents found:

"1. The Seminary has falsely represented that it has the authority to confer academic degrees, and it has in fact purported to confer such degrees.

2. The Seminary has led the Department and the Department's consultants to believe that it is operating in accordance with the academic plan set forth in support of the petition, whereas in fact it is not.

3. The operation of the Seminary reveals an insufficient regard for and compliance with the basic standards for the administration of a degree program.

4. The Seminary has not demonstrated that it possesses the necessary financial resources to operate a degree program."

As long as there is a rational basis in the record for the Board's determination or there are facts in the record more than sufficient to sustain the Board's determination, this Court cannot disturb the determination and substitute its opinion and expertise in the place of the respondent's,

even if it might want to do so *(Matter of Pell v. Board of Education,* 34 NY 2d 222; *Matter of Stracquadanio v. Department of Health;,* 285 N.Y. 93).

There is a rational basis in the record for respondent's determination and, therefore, the petition is denied and the respondents cross-motion for summary judgment dismissing the petition is granted.

Respondents to submit order.

All papers to the Attorney for Respondents for filing upon entry of the order hereon.

Opinion mailed 9/13/78.

APPENDIX E

FINAL COMMITTEE RECOMMENDATION
Board of Regents
The University of the State of New York
the State Education Building
Albany, New York 12234

TO: The Honorable The [sic] Members of The Board of Regents

FROM: Regents Genrich, Yavner and Bongiorno

SUBJECT: Unification Theological Seminary

Pursuant to a resolution of the Board of Regents adopted on April 29, 1977, we have made, with the assistance of staff of the Department, a study of various issues connected with the petition of the Unification Theological Seminary for the issuance of a charter and approval of an institutional master plan authorizing the Seminary to offer a program in religious education leading to the degree of Master of Religious Education.

Following the adoption of the April 29, 1977 resolution, we undertook a review of the academic questions raised by the reports of the consultants who visited the Seminary. We also made inquiries concerning other matters and proceedings involving The Holy Spirit Association for the Unification of World Christianity (the Unification Church) and its members to ascertain whether or not those proceedings had produced evidence related to the pending application.

I as chairman of the ad hoc committee gave an oral interim report on these matters in executive session at the July, 1977 Regents meeting. In November, 1977 we reported to the full Board on the status of our inquiries,

and a further report was submitted to the Board by staff at the December, 1977 meeting.

Our last report was submitted to the Regents for action at last months meeting. At that time, the petitioners submitted additional information and Mr. Warder spoke. In order to give due consideration to the new data they presented and to allow staff time to respond the matter was tabled until this meeting.

Throughout our review, we have given the petitioners a full opportunity to respond to relevant comments which we have received from others which tended to reflect adversely on their application, and we have asked them for clarification and explanation of various matters concerning the nature and operation of the Seminary. Their responses have all be distributed to all members of this Board including the information which was sent to me as late as last Saturday, February 18, 1978.

The record before the Board of Regents includes the material submitted at the meetings of the Board held in February, March, April, November, December, 1977 and January, 1978, this report and the annexed staff report, and the additional material submitted for consideration at the January and February 1978 meeting. The developments subsequent to the December, 1977 staff report are reviewed in the annexed staff report, which also sets forth the conclusions and recommendation of staff and of the Commissioner, and the underlying facts upon which they are based.

We found during the course of our review that information provided by the petitioners to the Department and the Regents has been inconsistent and conflicting.. Because some of that information, we well as information pro-

vided by others, related to academic and administrative aspects of the operation of the Seminary, it was determined that related records of the Seminary should be reviewed by Department staff. A site visit for that purpose was conducted by staff on December 20, 1977. The results are fully discussed in the attached staff reports.

Staff has found discrepancies between the policies and practices of the Seminary as represented to the consultants, the Department and the Regents by the petitioners, and the policies and practices actually in use at the Seminary. It has also found serious deficiencies in the conduct and administration of the academic program. Those findings are fully set forth in the accompanying staff reports and in the notes and exhibits thereto, and it is not necessary to repeat them here in detail. However, I do point out for example, during the December visit staff learned that the baccalaureate degree was not required of many foreign students; that the Seminary had no reliable way of determining whether or not these students held a baccalaureate degree or its equivalent. Students were not required to submit letters of reference from former professors as stated in the Seminary requirements. Briefly staff report among other things shows that during the course of the December 20 visit, staff learned that the Seminary has distributed a printed catalog for the 1977-78 academic year which represents that the Seminary conducts a program leading to the degree of Master of Religious Education. The Seminary has no authority to confer that degree, or any other degree and had given the Department assurance that it would not make representations to the contrary. A similar previous incident, involving a brochure which was distributed by the Seminary in 1976 and which announced the offering of the M.R.E. degree, was discussed in the November 18, 1977 report of

this Committee. In their December response to that report, Messrs. Warder and Ang and Mrs. Stewart admitted the improper distribution of the 1976 brochure, regretted the action, and stated that they had corrected it, even though The Seminary was then in the process of distributing a catalog which continued to misrepresent the facts. Attached to this report are copies of pages 33 and 34 of the Seminary's 1977-78 catalog.

We emphasize the staff finding that the Seminary has repeatedly represented that it offers a degree program and has prepared and issued transcripts indicating the degrees have been awarded, in spite of assurances that it would not misrepresent its status, and in violation of Education Law sections 210, 218 and 224, Rules 3.46 of the Rules of the Board of Regents and Part 52 of the Regulations of the Commissioner of Education.

We also note that under the financial plan originally submitted by petitioners, the Seminary would have been dependent upon a lease of property to the Unification Church of New York, Inc., a New York corporation, for rental income which would provide it with money to meet operating expenses and to meet the financial assets requirement of section 218 of the Education Law. Staff obtained a financial report for that corporation, and was satisfied that it had the resources necessary to fulfill its obligations under the lease arrangement. Staff later discovered that the said corporation was no longer active, and had disposed of most if its assets. When staff asked petitioners about this development, petitioners admitted that most of the assets of the New York corporation had been transferred to The Holy Spirit Association for the Unification of World Christianity, a California corporation. They then submitted a similar lease arrangement be-

tween the Seminary and the California corporation. Staff on two separate occasions requested an audited financial statement for the California corporation. While a financial statement has been submitted, it is not an audited statement and is therefore unacceptable. As a result, no satisfactory demonstration has been made that the Seminary has the necessary financial resources to operate a degree granting institution of higher education.

Your Committee has concluded that the findings and recommendations of the staff and the Commissioner should be accepted, and that the application for the issuance of a provisional charter to Unification Theological Seminary, and for approval of its proposed institutional master plan, should be denied.

Your Committee's review has been conducted at all times with a scrupulous respect for the petitioners' constitutional rights to freedom of speech, freedom of religion, and due process of law. We have limited our inquiry to the actual and proposed operation of the Seminary and to the actions, but not the beliefs of its sponsors. This is in accordance with the statement adopted by the full Board on February 24, 1977. We have considered only actions which are related to the fitness of this institution to be admitted to membership in The University of the State of New York and to hold and exercise the authority to grant graduate degrees. The issue before us is not whether we approve of the Unification Church or its beliefs, but whether the Seminary meets the standards of The University of the State of New York and of the academic community which it seeks to join. We have concluded that it does not. Some of the questions raised during the course of our study are still unresolved. However, the facts now before us convince us that further inquiry is not necessary.

We conclude that the Unification Theological Seminary does not meet the standards of operation of degree granting institutions. The Seminary has falsely represented that it has the authority to confer academic degrees, and it has in fact purported to confer such degrees. The Seminary has led the Department and the Department's consultants to believe that it is operating in accordance with the academic plan set forth in support of the petition, whereas in fact it is not. The operation of the Seminary reveals an insufficient regard for and compliance with the basic standards for the administration of a degree program. The Seminary has not demonstrated that it possesses the necessary financial resources to operate a degree program.

It should not be emphasized that the denial of the petitioners' requests does not affect their right to hold or practice their religious beliefs, or to continue to operate the Seminary as a non-degree granting institution.

Your Committee recommends, and I move, that the Board of Regents take the following action:

Voted that the petition for the issuance of a provisional charter to the Unification Theological Seminary and the Seminary's application for approval of its institutional master plan are denied.

2/22/78

Opposition

No. 81-777

Office - Supreme Court, U.S.
FILED
NOV 27 1981
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MICHAEL YOUNG WARDER, et al.,
as Proposed First Trustees of the
Unification Theological Seminary,

Petitioners,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY
OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE STATE OF NEW YORK COURT OF APPEALS

BRIEF FOR RESPONDENT OPPOSING CERTIORARI

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JEAN M. COON
DONALD O. MESERVE
Of Counsel

Table of Contents

	Page
Table of Authority.....	ii
Statement of the Case.....	1
Argument.....	11
1. The Decision Of The Court Below Does Not Conflict With Prior Decisions Of This Court Concerning Disqualification Of An Administrator.....	11
2. The Decision Below Does Not Conflict With This Court's Decision In Perry v Sindermann.....	21
3. The Decision Of The Court Below Does Not Conflict With Decisions Of This Court Relating To The Equal Protection Of The Laws.....	26
Conclusion.....	32

Table of Authority

	Page
Board of Regents v Roth, 408 U.S. 564 (1972).....	22
Cinderella Career and Finishing Schools v F.T.C., 425 F2d 583 (C.A.D.C. 1970).....	18,19
F.T.C. v Cement Institute, 333 U.S. 683 (1948).....	20
Hortonville Joint School District v Hortonville Education Association, 426 U.S. 482 (1976).....	19,20
Klein v O'Hagen, 51 NY2d 784 (1980)..	15
Klein v O'Hagen, 70 AD2d 514.....	16
Perry v Sindermann, 408 U.S. 593 (1972).....	21,22 23
State Division of Human Rights v Merchants Mut. Ins. Co., 59 AD2d 1054, 1056 (4th Dept. 1977).....	16
United States v Morgan, 313 U.S. 409 (1941)..	20
Withrow v Larkin, 421 U.S. 35,47 (1975).....	20
Statutes	
N.Y. State Administrative Procedure Act § 303.....	15

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

MICHAEL YOUNG WARDER, et al.,
as Proposed First Trustees of the
Unification Theological Seminary,

Petitioners,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY
OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE STATE OF NEW YORK COURT OF APPEALS

BRIEF FOR RESPONDENT OPPOSING CERTIORARI

Respondent respectfully prays that the petition for a writ of certiorari be denied.

Statement of the Case

The Unification Theological Seminary, Barrytown, New York, is affiliated with the Holy Spirit Association for the Unification of World Christianity, a religious organization headed by the Rev. Sun Myung Moon. The Seminary may, and does,

operate non-degree programs without any license or approval by respondent. However it may not be incorporated as an institution of higher education, or offer or conduct an educational program leading to the award of any degree, unless it meets the requirements of the New York statutes, rules and regulations which govern educational corporations and which establish minimum standards for degree programs.

Petitioners, the proposed first trustees of a proposed educational corporation to be known as the Unification Theological Seminary, applied for the creation of a New York educational corporation by the issuance of a charter by the Board of Regents, and for registration of an educational program leading to the degree of master of religious education.

Petitioners seek certiorari to review State court decisions which sustained two

determinations by the Board of Regents. The first action, taken in April, 1977 by a vote of twelve to two, provided for a Regents committee to review petitioners' application and to report back to the full Board. The second action, taken in February, 1978 by a vote of thirteen to zero, was the denial of petitioners' application. Petitioners instituted two State court proceedings, which were reviewed together by the State appellate courts. The first proceeding, commenced in July, 1977, sought an order compelling the Board of Regents to act forthwith on petitioners' application, on the basis of the information submitted by the Commissioner of Education and by Department staff, and without further review or investigation. That proceeding was dismissed by a decision of Supreme Court, Albany County, dated November 28, 1977

...

(p.30a)*

The second State court proceeding was commenced June 21, 1978 and was decided by Supreme Court, Albany County, on October 18, 1978 (p.35a). Judgments in both proceedings were entered on November 14, 1978. The two appeals were heard jointly by the appellate courts, and single decisions were issued in both the Appellate Division, Third Department, and in the New York State Court of Appeals (pp. 19a, 1a).

The first Regents action was not a final determination on the merits of petitioners' application, but rather a declination by a majority of the Board to accept the recommendation of the Commissioner and Department staff that a charter be granted, without further inquiry

*Numbers in parentheses refer to page numbers in the petition for certiorari and the appendix thereto.

by the Regents themselves with respect to a number of questions, including both academic and collateral issues. Those questions are discussed and explained in the decisions of the Courts below (pp.8a-9a, 32a, 34a).

During the public debate on the resolution to appoint a Regents committee to review the matter, individual Regents made statements, some in support of the resolution and some in support of the immediate granting of petitioners' application. In their petition to this Court, petitioners rely on excerpts from statements made during that debate by only two of the fourteen members of the Board present at that meeting, which statements petitioners claim demonstrate bias. However, petitioners did not object to the further participation of those Regents in the consideration of their application until after the final determination, ten

months later. Although the former Commissioner of Education had recommended approval of petitioners' application at the April, 1976 meeting, he vacated his office on June 30, 1977 pursuant to action taken by the Regents in November, 1976, and was not involved in or privy to the investigations and reports of the Regents committee after that date.

The review of petitioners' application by the Regents committee was conducted between April, 1977 and January, 1978. The committee reviewed the academic and collateral issues which had been raised and discussed at the April, 1977 meeting. During the period of the review respondents received information from various sources. All information which appeared to be relevant to the inquiry was promptly transmitted to the petitioners so that they would have an opportunity to respond, and petitioners'

responses were carefully considered. As the time for a final recommendation by the committee approached, a site visit was conducted to ascertain first hand the nature of the operation of the Seminary as reflected by the Seminary staff and records and to determine whether or not such operation conformed to established academic standards, and to the program of operation which had been submitted by the petitioners.

The final determination of the respondents was based on academic deficiencies and incompetence disclosed as a result of the site visit, and on the failure of the petitioners to submit satisfactory evidence of financial income and stability sufficient to operate a masters degree program (pp.6a-7a, 24a, 40a, 44a-46a).

Petitioners contended in their first State court proceeding that the Regents

delayed action on their charter application for reasons associated with their religious beliefs. However, the record clearly shows, and the Courts below found, that the somewhat lengthy review was necessitated by concern about alleged secular practices of the petitioners and the Seminary.

Petitioners contend in their second State court proceeding that their petition for a charter was ultimately denied for reasons associated with their religious beliefs. Again, the record clearly shows, and the Courts below found, that the denial of a charter was based on purely secular deficiencies.

Petitioners contend that they have been denied equal protection of the laws because the Regents took a longer and more careful look at their charter application than petitioners understand to be the Regents' general practice. What

petitioners appear to be suggesting is that it is constitutionally impermissible for a regulatory agency to give greater scrutiny to one application than to another, regardless of the facts and circumstances. Both of the State Supreme Court Justices who heard the two proceedings below found that petitioners had failed to allege facts sufficient to require a trial, and granted summary judgment dismissing the petitions. The Appellate Division, Third Department, unanimously affirmed. The State Court of Appeals affirmed by a vote of four to three. Three Judges of the Court of Appeals dissented solely on the ground that the proceedings should not have been dismissed by summary judgment. All of the twelve State Court Judges who reviewed the second State court proceeding agreed that the facts disclosed in the

record sustained and justified the final Regents determination.

Argument

Petitioners state three "Reasons for Granting the Petition". Each is based upon an argument that the decision below conflicts with decisions of this Court. No other basis for granting certiorari is set forth.

Respondent does not contest the general principles of due process cited by petitioners, but contends that in this case there clearly has been no violation of due process or of petitioners' rights.

Respondent answers petitioners' three arguments as follows:

1. The Decision Of The Court Below Does Not Conflict With Prior Decisions Of This Court Concerning Disqualification Of An Administrator.

Petitioners contend that the determination of thirteen members of the Board of Regents, made in February, 1978, should be set aside because of remarks made by two members of the Board ten months

earlier. The remarks of the two Regents clearly reflect disapproval at that time, by those two Regents, of the Unification Church. They do not establish that the Board as a whole, or the two Regents, were unable to judge the Seminary's application on the merits, or that they did not in fact do so.

The question before the Regents at that time was whether to approve the application on the basis of the then favorable recommendations of the Commissioner and Department staff, or whether the questions arising from the reports of independent academic consultants, the pending House of Representatives investigation of alleged Korean Central Intelligence Agency connections, communications from members of the public, and concerns of the Regents themselves justified further review by a Regents committee. As Justice STALEY of the New York State

Supreme Court noted in his decision dismissing the petitioners' first State court proceeding, the Board of Regents is a public body which meets monthly; the Board is not required to act within a specified time; a joint resolution of both Houses of the New York State Legislature had urged the Board to further review the application; and the responsibility of approval or disapproval of the application rested with the Board of Regents and not with its staff or the Commissioner. Under those circumstances it was reasonable, as the New York Courts have found, for the Board to appoint a committee to review the matter and to report to the full Board. The remarks of the two Regents referred to by petitioners were made in the course of a heated debate, and should not be considered out of context.

It is clear from the record that the

assignment of the Regents committee was to obtain answers to specific factual questions which were or might be relevant to the application by the Seminary. Petitioners' religious beliefs were clearly irrelevant to that inquiry. The answers to those questions could as readily have led to approval as to disapproval of the Seminary's application.

It is equally clear that the final determination, made in February, 1978, was based entirely on deficiencies in the operation of the Seminary, discrepancies between the academic plan presented to the Regents and the actual operation of the academic program, and the failure of the petitioners to submit satisfactory evidence of sufficient ability and financial resources to operate a Seminary.

Under New York law, petitioners should have raised the question of disqualification of the two members of the

Board of Regents in a timely manner, by addressing a request for their disqualification to the full Board of Regents. New York State Administrative Procedure Law § 303 provides

> "Upon the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a presiding officer, the agency shall determine the matter as part of the record in the case, and its determination shall be a matter subject to judicial review at the conclusion of the adjudicatory proceeding."

Although the Regents' determination was not an adjudicatory proceeding, and therefore not governed by the above quoted statute, the same underlying policy is applicable. The issue of disqualification should be raised and passed on in the first instance by the agency itself (Mtr. of Klein v O'Hagan, 51 NY2d 784 [1980]).

Where a claim of bias has been made

before a judge or administrative officer, and self-disqualification does not occur, the issue may be raised on an appeal from the final determination, and the appellate body will determine "whether there was bias and if it affected the result to the detriment of the one claimed to have been aggrieved; if it did not exist, or if, existing, it did not unjustly affect the result, it would be no ground for a successful appeal" (State Division of Human Rights v Merchants Mut. Ins. Co., 59 AD2d 1054, 1056 [4th Dept. 1977], quoted in Mtr. of Klein v O'Hagen, supra, 70 AD2d 514 at p. 516).

Here there has been no showing of bias, and the statements allegedly betraying bias are remote in time and unrelated in content to the factual reasons for the denial of the Seminary's application.

The situation in this case is very

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different from that presented in Cinderella Career and Finishing Schools v F.T.C. (425 F2d 583 [C.A.D.C. 1970]), relied upon by petitioners. That case involved an allegedly deceptive advertisement. One of five Commissioners who was to serve on an appellate review board made a speech in which he clearly indicated that he had prejudged the facts of the case outside of the record. Although asked to disqualify himself he refused to do so. In this case there is absolutely no evidence of any prejudgment of any of the facts. The expressions of views by two Regents concerning the Unification Church did not constitute prejudgment of any of the facts relating to the Seminary. If the Regents had disapproved the Seminary's application because of disapproval of the Church there would be a substantial question for this Court. But they clearly did not do so,

and the facts upon which they did base their determination are totally unrelated to any opinion about the Church or its religious beliefs or practices. Unlike Cinderella, there was no prejudgment of any fact relevant to the administrative determination, and no consideration of any material outside the administrative record. There was no "advance commitment on factual determinations", and the facts gathered and considered by the Regents were a part of its administrative review and record, notwithstanding petitioners' assertions to the contrary (p.12).

The requirements of due process were considered by this Court in Hortonville Joint School District v Hortonville Education Association (426 U.S. 482 [1976]), in which the Court noted:

> "Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a

> decisionmaker. Withrow v Larkin, 421 U.S. 35,47 (1975); F.T.C. v Cement Institute, 333 U.S. 683, 700-703.(1948). Nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.' United States v Morgan, 313 U.S. 409, 421, 85 L. Ed. 1429, 61 S. Ct. 999 (1941); see also F.T.C. v Cement Institute, supra, at 701, 92 L. Ed. 1010, 68 S. Ct. 793."

The Hortonville case, like the instant case, involved a board with overall responsibility for a segment of the education system. The Court noted "the presumption of honesty and integrity in policymakers with decisionmaking power," and stressed that the facts upon which the board based its action were not in dispute. Both those considerations are relevant in this case. Petitioners have made no showing that either the Board of

Regents as a whole or any individual Regent was incapable of judging petitioners' application on the merits.

2. The Decision Below Does Not Conflict With This Court's Decision In Perry v Sindermann.

Petitioners cite Perry v Sindermann (408 U.S. 593 [1972]) for the proposition that "summary judgment is inappropriate in the face of a bona fide constitutional claim that an otherwise discretionary exercise of state power is in reprisal for the exercise of First Amendment freedoms." True. Summary judgment is inappropriate in the face of the allegation of any facts sufficient to set forth a cause of action. But in this case, petitioners failed to allege any such facts in either of the two State court proceedings.

A mere conclusory allegation of prejudice is insufficient to raise a triable issue, or to require a due process hearing before an administrative body

(Perry v Sindermann, supra, p. 599 n. 5; Board of Regents v Roth, 408 U.S. 564 (1972), p. 575, n. 14). Perry v Sindermann, supra, is distinguishable from the instant case in two important respects. Perry had specifically alleged a factual background which lent plausibility to his claim that the determination not to extend his employment was based on his public advocacy of a policy opposed by his employers, and upon a newspaper advertisement highly critical of them. Furthermore, his employers gave no official statement of the reason for their determination, and allowed Perry no opportunity to challenge the basis for the determination. In a press release and in the Court action they cited insubordination as a reason. Perry's advocacy and public criticism were First Amendment speech, and if the insubordination was based upon those statements

a valid constitutional cause of action may have existed. In Perry v Sindermann the Court could not discern from the pleadings whether or not a valid reason existed for not rehiring Perry. His allegations were not refuted by factual allegations, and summary judgment was inappropriate.

This case is very different. Both the April, 1977 determination for a Regents review of petitioners' applications and the February, 1978 determination denying it are based upon facts which are clearly stated in the record, and which are separate and distinct from any exercise by petitioners of any First Amendment rights.

In April, 1977, the Board of Regents appointed a committee to review petitioners' application because the Regents believed that there were a number of outstanding questions which should be

answered before they acted. Those questions included such academic matters, raised in the reports of independent consultants who had visited the Seminary, as the adequacy of the library and the availability of faculty to students. They also included collateral matters, such as possible involvement with the Korean Central Intelligence Agency (then under investigation by a subcommittee of the House of Representatives), charges of alleged "brainwashing" of students, and the solvency and stability of the Seminary (pp. 2a, 34a). None of those questions relates to the exercise by petitioners of any First Amendment right. The factual allegations in the answer in the first State court proceeding rebutted petitioners' conclusory allegations of a violation of First Amendment rights, and summary judgment was appropriate.

Petitioners have also failed to allege facts sufficient to defeat summary judgment in the proceeding to review the Regents' final determination. There is absolutely no evidence to support their claim that the determination was motivated "by a desire to suppress their religious freedoms and by a non-secular purpose to promote established religions" (p. 14). To the contrary, the facts upon which the Regents based their determination are clearly stated and established, are unrefuted, and convincingly demonstrate the failure or inability of the petitioners to conduct the educational program of the Seminary in accordance with the standards required of all such programs. Those facts are set forth in the final report of the Regents committee and in the decisions of the Courts below (pp. 43a, 40a, 24a, 6a-7a).

3. The Decision Of The Court Below Does Not Conflict With Decisions Of This Court Relating To The Equal Protection Of The Laws.

Petitioners contend that there must be a compelling justification for disparities in treatment based upon religious affiliation or political belief. We do not disagree, but in this case there has been no disparity of treatment based upon religious affiliation or political belief.

Petitioners state that they "stand alone as the only applicants ever to have been denied an application for provisional charter on the grounds advanced." Respondent agrees. The case is unique. Never before has the Board of Regents found that an institution was sending transcripts to other institutions indicating that its graduates had received masters' degrees when the institution was not authorized to issue such degrees. Never before have applicants for a

Regents charter failed to tell the Regents that a corporation which was to provide the operating funds for a proposed school had been stripped of its assets after the Regents had approved the financial plan.

Petitioners rely on an affidavit by former Education Commissioner Ewald B. Nyquist expressing his opinion that other institutions have been chartered "with greater deficiencies and/or fewer strengths than the Seminary possesses." Since the Commissioner is not specific, and since no factual allegations were submitted, it is impossible to reply to that statement, except to note that it is an unsubstantiated opinion and a mere conclusory allegation insufficient to raise a triable issue of fact, and clearly insufficient to overcome the reasonable basis for the Regents determination reflected on the entire record.

Former Commissioner Nyquist left office July 30, 1977, during the review by the Regents committee, and the record does not establish that he was familiar with later developments, or with the reasons upon which the Regents based their final determination.

Former Commissioner Nyquist further stated that petitioners had been held to "higher requirements" than other applicants. The only factual assertion offered in support of that conclusion is that the Regents requested an audited financial statement. The reasons for such request are fully explained in the decision of the Courts below (pp. 10a, 24a). Although the Seminary had title to valuable land, it had no income or cash and was entirely dependent on rent from a New York corporation for operating funds. The Department accepted that arrangement, but later learned (not from petitioners)

that the New York corporation had been stripped of its assets. When respondent asked petitioners about that development, petitioners offered to substitute a California corporation as lessee. Under those circumstances it was reasonable for respondent to insist upon an audited financial statement for the California corporation. Petitioners refused to provide it, and the petitioners' failure to submit satisfactory proof of financial adequacy and stability was one of the reasons for the denial of the application.

Petitioners claim "that the Board ultimately based the denial of the application for a provisional charter on deficiencies which had been overlooked in other similarly situated applicants" (p. 17). No such allegation is made in the pleadings and no such argument was made in the New York Courts. There is absolutely no basis for such a claim in

the record, and it may not be raised for the first time on this application.

The evaluation of the Seminary's application required the consideration and resolution of questions ranging from the adequacy of the library to alleged involvement with the K.C.I.A. The "equal protection of the laws" did not prevent the Regents from personally reviewing the facts, instead of merely relying on Department staff, or from considering the truth and relevance, if any, of collateral charges, such as K.C.I.A. involvement and "brain washing," or from closely scrutinizing the operation of the Seminary to resolve conflicting or ambiguous statements. Due process required that all adverse statements which might be considered by the Regents be made available to petitioners, that petitioners be afforded an opportunity to respond, and that their responses be fully considered. The two

volume, 639 page record in the second State court proceeding clearly reflects the fair and thorough manner in which the Regents sought and found the true and relevant facts. Neither the standards to which petitioners were held nor the manner in which the review was conducted constituted denial of the "equal protection of the laws". Petitioners have been unable to allege any facts which would sustain their claim in this respect.

Conclusion

Petitioners do not and cannot deny the truth of the facts upon which the Board of Regents relied in denying the Seminary's application. They are admitted by the Seminary staff in the record. They clearly justify the denial of the application.

Petitioners have failed to establish any basis for intervention by this Court. No principle of law is involved, but only the application of accepted principles to the unique facts of this case. Petitioners' conclusory allegations of bias or of a violation of due process are unsupported by factual allegations and are overwhelmingly rebutted by the facts and procedure disclosed in the record.

Petitioners complain that the denial of their application "inhibits its ability to attract a variety of students,

restricts its participation in various educational associations, precludes its foreign students from qualifying for visas, and disables all students from eligibility for many student loans" (p. 14). Respondent's answer is that those benefits are dependent on the operation of an academic program which meets the State's minimum standards. Petitioners have not met those standards, and indeed do not claim that they have. In effect they seek to use what they themselves call their "unpopularity" as a sword to obtain the right to operate a college without meeting standard academic and fiscal requirements. Their proper course of action is not further litigation, but to learn from their mistakes, to upgrade their program, and to reapply to respondents when they can meet the minimum requirements. No basis has been

presented for the exercise of jurisdiction by this Court.

Respectfully submitted,

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